

NOT FOR PUBLICATION - FOR UPLOAD

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION**

MAXWELL PETERS,

Appellant,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

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) **Crim. App. No. 1997-99**

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) Re: Terr. Ct. Crim. No. F40/1995

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On Appeal from the Territorial Court of the Virgin Islands

Considered: November 30, 2001

Filed: January 23, 2002

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **MARIA M. CABRET**, Presiding Judge of the Territorial Court, Sitting by Designation.

ATTORNEYS:

Harold W. L. Willocks, Esq.

Territorial Chief Public Defender
St. Thomas, V.I.

Attorney for Appellant,

Joel H. Feld, Esq.

Assistant Attorney General, Department of Justice
St. Thomas, V.I.

Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

I. INTRODUCTION

Pending before this Court is the Government of the Virgin Islands' motion to dismiss Maxwell Peters' criminal appeal as untimely. The record indicates that Peters filed his notice of appeal more than ten days after the entry of judgment, but within the thirty-day extension period permitted under Federal Rule of Appellate Procedure 4(b). Consequently, this Court will remand this matter to the Territorial Court and instruct the trial judge to determine whether Peters made a "showing of excusable neglect" warranting an extension of time to file his appeal.

II. FACTUAL AND PROCEDURAL HISTORY

Maxwell Peters ["Peters" or "appellant"] was charged with one count of assault in the third degree and three counts of attempted armed robbery in the first degree, in violation of V.I. CODE ANN. tit. 14, §§ 297(2) and 1862(2). (App. at 17). After a jury trial, Peters was convicted of all four counts, and was sentenced to thirty years' imprisonment. The trial court signed its original judgment on April 1, 1997, and an amended judgment was signed on June 25, 1997. (See App. at 9, Territorial Court Docket Sheet; Blue Brief at 16-18, Amended Judgment). A notice of entry of amended judgment was sent to the parties on June 26, 1997. (See App. at 10, Territorial Court Docket Sheet).

In a letter dated July 14, 1997, Peters, *pro se*, claimed that he instructed his trial attorney to file an appeal, but that his lawyer told him that there were no appealable issues in his case. (App. at 1). Peters stated that he had not heard from his lawyer concerning whether she had filed an appeal and thus requested that the trial court consider his letter a notice of appeal. He acknowledged that his notice was filed untimely, but averred that the tardiness was due to "justifiable cause." Peters' return address indicated that he was being detained by the Bureau of Corrections. This letter was received by the trial court on July 29, 1997. (See *id.* at 10, Territorial Court Docket Sheet).

The Government of the Virgin Islands ["government" or "appellee"] moved this Court to dismiss Peters' appeal, arguing that it was untimely filed and that, therefore, this Court lacks jurisdiction to consider it. (Government's Motion to Dismiss, Oct. 14, 1998). In making its argument, the government notes that the trial court's amended judgment was entered on June 26, 1997, and that Peters' letter was filed on July 29, 1997. The government contends that, as a result, Peters' appeal was untimely under Federal Rule of Appellate Procedure 4(b) because it was filed more than ten days after the entry of judgment in his case.

Peters, represented by the Territorial Public Defender ["Public Defender"], then filed his brief, in which he argues that the trial court erred in denying his motion to suppress a pre-trial identification of him. Peters maintains that the identification was flawed because it was unnecessarily suggestive. (Blue Brief at 8-12). The government has not filed a brief in response.

On December 20, 1999, this Court issued an order instructing Peters to file a response to the government's motion to dismiss. (Order Civ. App. No. 1997-099 (D.V.I. App. Div. Dec. 20, 1999)). After the Public Defender failed to respond, this Court, on February 28, 2000, instructed the Public Defender to show cause, no later than March 13, 2000, why sanctions should not be imposed for its failure to obey this Court's earlier order. (Order, Civ. App. No. 1997-099 (D.V.I. App. Div. Feb. 28, 2000)). On November 8, 2001, this Court issued a show cause order requiring the Public Defender to appear before it to explain why sanctions are not warranted. See Order Civ. App. No. 1997-099 (D.V.I. App. Div. Nov. 8, 2001). The Public Defender duly appeared and this collateral matter is resolved by a separate order.¹

¹ See Order Civ. App. No. 1997-99 (D.V.I. App. Div. Jan. 9, 2002)).

III. DISCUSSION

A. Standard of Review

This Court has jurisdiction to consider the judgments and orders of the Territorial Court in criminal cases. 4 V.I.C. § 33; Section 23A of the Revised Organic Act of 1954.² This Court exercises plenary review over questions of law. *Government v. Petersen*, 131 F. Supp. 2d 707, 709 (D.V.I. App. Div. 2001). "The timely filing of a notice of appeal is a mandatory jurisdictional prerequisite to the right to appeal." *Soldiew v. Government of the Virgin Islands*, Civ. No. 92-108, 1995 WL 48467, at *1 (D.V.I. App. Div. Jan. 19, 1995) (quoting *United States v. Grana*, 864 F.2d 312, 314 (3d Cir. 1989)).

B. The Timeliness of Peters' Notice of Appeal

Peters was convicted in 1997, before the promulgation of the Virgin Islands Rules of Appellate Procedure, which became effective on November 1, 1998. See V.I. R. APP. P. 1(b). The Federal Rules of Appellate Procedure, therefore, govern this appeal, per Local Rule of Civil Procedure 76.1, which then provided that:

² See Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

Practice in the Appellate Division of the District Court of the Virgin Islands of the United States shall conform to the fullest possible extent with the practice in the Court of Appeals for the Third Circuit, and shall be governed by the Federal Rules of Appellate Procedure, the Rules of the United States Court of Appeals for the Third Circuit, the case law interpreting these rules, and such local rules as experience determines to be necessary and appropriate.

Federal Rule of Appellate Procedure 4(b) requires that, in a criminal case, a notice of appeal must be filed within ten days of entry of judgment or order, unless the appellant files one of several motions, none of which are applicable in this case. Peters, thus, was required to file his notice of appeal within ten days of the entry date of the trial court's amended judgment, June 25 or June 26, 1997.³ (*App.* at 9, District Court Docket Sheet). In computing the filing period, all calendar days are included from the day following the date of entry of judgment. FED. R. APP. P. 26(a). Saturdays, Sundays and legal holidays are excluded from the computation only when the filing period is less than seven days. *Id.* At the latest, therefore, Peters had until July 7, 1997, to file his notice of appeal.⁴ Peters' letter was

³ It is not clear from the record which is the actual entry date of the judgment. The Territorial Court's docket sheet indicates that the amended judgment in Peters' case was signed on June 25, 1997, and that notice of entry of the judgment was sent to the parties on June 26, 1997.

⁴ Assuming that the judgment was entered on June 26, 1997, ten days from this date would have been July 6, 1997. Because this date was a Sunday, Peters would have had until the next business day, Monday, July 7, 1997, to file his notice of appeal. See Fed. R. App. P. 26(a)(3).

dated July 14, 1997, and filed in the trial court on July 29, 1997. Peters' notice of appeal, thus, was untimely filed.

Peters' letter, however, indicates that he was incarcerated when he mailed it. A *pro se* prisoner's notice of appeal is deemed filed on the date the prisoner delivers it to prison authorities or places it in the prison mail system. See FED. R. APP. P. 4(c); *Houston v. Lack*, 487 U.S. 266, 276 (1988). If Peters was, in fact, incarcerated when he mailed his letter, then his letter would be deemed filed on the date he submitted it to authorities or placed it within the prison mail system. Even assuming, *arguendo*, that the "mailbox rule" applies in this case, and Peters' letter would have been considered filed on July 14, 1997, the date he addressed it, he still would be beyond the ten-day time limit prescribed by Rule 4(b).

Peters' motion may yet be timely under Rule 4(b), which allows a trial court "[u]pon a showing of excusable neglect, . . . before or after the time has expired, with or without motion and notice [to] extend the time to file a notice of appeal for a period not to exceed [thirty] days from the expiration of the time otherwise prescribed" by Rule 4(b). See FED. R. APP. P. 4(b)(4)(1997) (amended 1998).⁵ Rule 4(b)(4) permits the court to

⁵ Because Peters was convicted in 1997, his appeal is governed by the Federal Rules of Appellate Procedure in place at that time. In 1997, the Rules of Appellate Procedure allowed a trial court to grant an extension of

grant such an extension when a criminal defendant has filed a motion for an extension of time after the ten-day period has elapsed, but within the thirty-day extension period. See *United States v. Richmond*, 120 F.3d 434, 435-36 (3d Cir. 1997). Most appellate courts have interpreted Rule 4(b) to mean that, in criminal cases, a notice of appeal filed within thirty days after the expiration of the filing period functions as a request for an extension of time due to excusable neglect. See *Willians v. EMC Mortgage Corp.*, 216 F.3d 1295, 1297 (11th Cir. 2000); *United States v. Vastola*, 899 F.2d 211, 221-22 (3d Cir.) (collecting cases), *vacated on other grounds*, 497 U.S. 1001 (1990).

Here, Peters' notice of appeal was filed on July 29, 1997, within Rule 4(b)'s thirty-day extension period. "An appellate court cannot enlarge the time for an appeal because the absence of timely notice deprives it of subject matter jurisdiction." *Vastola*, 899 F.2d at 220. A trial court, however, retains jurisdiction to do so retroactively, even "after the expiration of the thirty-day extension period." *Id.* at 222. Where a trial court has not made such a determination, the appellate court should remand the case to the trial court. See *Richmond*, 120

time to file an appeal only upon a "showing of excusable neglect." FED. R. APP. P. 4(b)(4) (1997). In 1998, Rule 4(b) was amended to permit courts to grant an extension of time upon a "finding of excusable neglect or good cause." FED. R. APP. P. 4(b)(4).

F.3d at 436 (dismissing defendant's appeal on other grounds). This Court, therefore, will remand this matter and instruct the Territorial Court to determine whether Peters' reliance on his attorney to file his appeal constituted a "showing of excusable neglect."

IV. CONCLUSION

Because Peters' notice of appeal was untimely filed pursuant to Federal Rule of Appellate Procedure 4(b), but was filed within Rule 4(b)'s thirty-day extension period, this Court will remand this case to the Territorial Court with instructions to determine whether Peters made a "showing of excusable neglect." Finally, we point out that Peters attempted to appeal his conviction in July 1997, nearly four and a half years ago. We acknowledge that this delay was not caused by the trial court, and nevertheless hope that Peters' case may be considered expeditiously on remand.

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Attorney for Appellant,

Joel H. Feld, Esq.

Assistant Attorney General, Department of Justice
St. Thomas, V.I.

Attorney for Appellee.

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that this matter be **REMANDED** to the Territorial Court, and that the court shall determine whether Maxwell Peters made a "showing of excusable neglect" excusing his untimely notice of appeal.

ENTERED this 23rd day of January, 2002.

ATTEST:

WILFREDO F. MORALES

Clerk of the Court

By:

Deputy Clerk

Copies to:

Judges of the Appellate Panel
Hon. Geoffrey W. Barnard
Hon. Jeffrey L. Resnick
Judges of the Territorial Court
Harold W. L. Willocks, Esq.
Joel H. Feld, Esq.
Mrs. Jackson
Mrs. Francis
Kim Bonelli
Chris Ann Keehner, Esq.